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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 487

DOUGLAS CHANDLER, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the district court (Ford, D.J.) denying petitioner's motion to dismiss the indictment (R. 41-51) is reported at 72 F. Supp. 230. The opinion of the district court denying petitioner's motion for discovery and inspection (R. 38-40) is reported at 7 F.R.D. 365. The opinions of the district court denying petitioner's motion for leave to inspect the grand jury minutes (R. 40), denying his motion for a bill of particulars (R. 41), denying his motion for discharge from custody (R. 56-58), and finding him sane (R. 52-56), are not reported.

The opinion of the Court of Appeals (R. 1908-1946) has not yet been reported.

## JURISDICTION

The judgment of the Court of Appeals was entered December 3, 1948 (R. 1946). The petition for a writ of certiorari was filed December 29, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

## QUESTIONS PRESENTED

1. Whether treason against the United States can be committed outside the territorial jurisdiction of the United States.

2. Whether broadcasting by radio of propaganda for the enemy, from the enemy country, for pay, for the purpose of weakening the country of allegiance and insuring the enemy's success, constitutes treason.

3. Whether the treasonable nature of what was said in a recording on a specific occasion for subsequent broadcast in a program of psychological warfare, the overt act of making the utterance being established by two-witness proof, may be inferred from the other evidence in the case.

4. Whether proof of the effectiveness of the enemy's program of psychological warfare by broadcasting radio propaganda, in which petitioner participated, was necessary to prove treason.

5. Whether, where the treasonable enterprise is of long duration, "more than a few" overt acts are required to be established by two-witness proof.

6. Whether the fact that petitioner's treasonable acts were committed out of a pure motive, a sincere belief that it was in the best interests of his country to lose the war, is relevant.

7. Whether petitioner was tried in a forum designated by Congress for the trial of treason committed without the territorial jurisdiction of the United States.

8. Whether the venue for petitioner's trial for treason was properly laid in the district of Massachusetts.

9. Whether the manner of petitioner's removal from Germany to the United States precluded his trial for treason against the United States.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first clause of Section 3, Article III of the Constitution provides:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The last clause of Section 2, Article III of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 1 of the Criminal Code (18 U.S.C., 1946 ed., 1; now contained in 18 U.S.C., 1948 Revision, 2381) provided:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Section 41 of the Judicial Code (28 U.S.C., 1946 ed., 102; now 18 U.S.C., 1948 Revision, 3238) provided:

> The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

## STATEMENT

Petitioner was indicted (R. 1-9) in the United States District Court for the District of Massachusetts for treason. The indictment alleged that from

December 11, 1941, to May 8, 1945, petitioner, a native-born citizen of the United States and a person owing allegiance to the United States, treasonably adhered to the enemies of the United States, to wit, the Government of the German Reich and the German Radio Broadcasting Company, its officials, and employees, giving these enemies aid and comfort. Petitioner's adherence and giving of aid and comfort to these enemies allegedly consisted of his having worked as a radio speaker and commentator in the U. S. A. Zone of the Short Wave Station of the German Broadcasting Company, which was controlled by the German Government, this work including the preparation and composition of commentaries, talks, and announcements and their recording for subsequent broadcast by radio from Germany to the United States. It was further alleged that these activities of petitioner were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of the war, and to weaken and destroy confidence in the administration of the Government of the United States.

Twenty-three overt acts were alleged (R. 3-8), all involving incidents of petitioner's broadcasting activities, and all alleged to have been committed with treasonable intent and for the purpose and with the intent to adhere to and give aid and comfort to the enemies of the United States.

After the court had found petitioner sane (R.

52-56), following an extensive preliminary hearing as to his mental capacity, he was tried before a jury. Six of the overt acts (Nos. 12-14, 19-21) were withdrawn by the Government prior to its opening statement (R. 412); seven others (Nos. 3, 7, 8, 10, 11, 15, 16) were withdrawn by the court prior to the submission of the case; and ten (Nos. 1, 2, 4-6, 9, 17, 18, 22, 23) were submitted to the jury (see *infra*, pp. 18-20). Petitioner was found guilty (R. 1860-1861), the jury making special findings that each overt act submitted to them was "a treasonable act committed by the defendant Chandler with an intent to betray the United States" (R. 32-33). Petitioner was sentenced to imprisonment for life and to pay a fine of $10,000 (R. 34, 1870). On appeal, the judgment of conviction was affirmed by the Court of Appeals for the First Circuit (R. 1946).

The evidence adduced by the Government may be summarized as follows:

Petitioner was born in Chicago in 1889 and has always been a citizen of the United States (R. 582). In 1931, he and his wife and their two small children went to Europe (R. 583), and he did not return to the United States until December 1946, when he was brought back from Germany in military custody (R. 56-57, 443-444).

From 1931 to 1941, petitioner and his family traveled extensively, and lived from time to time in France, Austria, Germany, Yugoslavia, and Italy (R. 583-598). In 1933, petitioner made his

first visit to Germany, where he met one Hoffman, an attache in the German Press Department, and a contact man for foreign journalists (R. 584). Through Hoffman, he became interested in the National Socialist regime and was greatly impressed by Nazi ideals and Hitler's social program (R. 584-585, 587-589). In 1936, in visits to Berlin, he met two families, the Schirmers and the Von Buelows, who were ardent Nazis (R. 593). In 1940, after the outbreak of war in Europe, while living in Florence, he became alarmed at the possibility of American involvement in the war as an ally of England (R. 598-599), and corresponded with the Von Buelows and Hoffman, who were in Germany, asking them if they "could suggest any way by which I could effectively work for the preservation of peace" (R. 599). The Von Buelows mentioned to him the possibility of his speaking over the German broadcasting system (R. 599).

In the winter of 1940-1941, all Americans in Florence were being urged by the American consul in that city to return to the United States, but due to his wife's ill health and his "rapidly crystallizing determination to actively fight against war participation," petitioner decided not to return to the United States (R. 599-600). He wrote to the Von Buelows that he was "willing to come to Berlin and see what plan they had to offer" (R. 600).

Unable to secure American passport facilities with which to travel to Germany, he secured a Ger-

man *Fremdenpass* (alien identity card) from the German consul in Florence, and in mid-February 1941 went to Berlin (R. 600). There he visited his friend, Dr. Schirmer, who was head of the Radio Broadcasting Division of the German Foreign Office, and told him of his "passionate wish to help protect my country from the horrors of war and that I would be happy to be permitted to speak over their broadcasting facilities as a 'free lance' commentator," stating that he was not interested in compensation (R. 600). Schirmer, however, told him that "such a detached setup would be impossible; that if I were to go to the microphone it would have to be within the frame of all other broadcasters, and that a salary or honorarium would be afforded me" (R. 602).

Through the Von Buelows, petitioner met Dr. Froelich, contact man for foreign journalists in the Press Department of the Ministry of Propaganda (R. 602). Froelich showed petitioner the broadcasting headquarters, explained how the commentators operated, and introduced him to subordinates, who offered him a tentative contract (R. 603). Some confusion ensued because petitioner discussed his project with the Propaganda Ministry, as well as with the Foreign Office (R. 602-603, 720-721, 732).

Petitioner then returned to Florence, discussed the plan with his wife, and finally determined to go through with the project. In March 1941, petitioner, his wife, and two daughters, all traveling

on German identity cards, motored to Germany in a car which bore the American flag. (R. 603-604, 888.)

Petitioner spent several weeks at the Propaganda Ministry's broadcasting offices formulating an approach for his messages. Froelich proposed use of a *nom de plume,* which he thought would add interest to the broadcasts, and petitioner agreed on condition that he could reveal his identity thirty days after commencing. (R. 604-605.) Petitioner chose "Paul Revere" as a name peculiarly appropriate to his mission of warning against British efforts to involve the United States in the war (R. 605, 607, 1046-1047). By way of theme "trade mark," it was decided to use the sound of galloping horses' hoofs and *Yankee Doodle* played on a flute (R. 605, 925). Recordings of this "trade-mark" were made with considerable care (R. 605). Petitioner wished to begin his broadcasts on April 18, 1941, the anniversary of Paul Revere's ride (R. 605, 606), but owing to technical difficulties he did not commence his talks until a week after that date (R. 606).

Petitioner's initial broadcasting contract was for six months (R. 609). Despite administrative and personal difficulties which he encountered during this period—he was in ill health and did not get paid regularly—he persevered in what he deemed to be his compelling duty (R. 606-609, 749). At the end of the six-month period, he left Berlin for a number of weeks to recuperate from his

illness and to negotiate a new contract (R. 609-610).

The Japanese attack on Pearl Harbor took place at about the time he returned to Berlin (R. 610). The United States' entry into the war made resumption of his broadcasting activities "a more complicated matter" (R. 610), but he "considered it his duty to keep up and continue his work," since he was convinced that the United States "was entering the war on the wrong side" (R. 722). Moreover, he considered the declaration of war by the United States against Germany merely "technical," since there had already been an "undeclared war in existence" for some months previous thereto (R. 610, 748). He did not consider being repatriated from Berlin along with the other Americans living there, but, on the contrary, early in 1942, informed Dr. Knochenhauer, the Propaganda Ministry lawyer, that he was prepared to resume his broadcasting activities (R. 611-612).

Thereafter, petitioner executed three contracts covering his work as a radio commentator (R. 612). One (Ex. 5, R. 448-449), with the Short Wave Station of the German Reich Radio Corporation, dated January 7, 1942, provided for a monthly salary of 1,000 marks; a second (Ex. 6, R. 450), with the Foreign Language Service Press Corporation, dated January 31, 1942, provided an additional salary of 750 marks a month; the third (Ex. 8, R. 510, 577, 1873), with the Anti-Komintern,

also dated January 31, 1942, called for a further monthly salary of 750 marks. Petitioner was responsible, however, only to the Short Wave Agency, the making of three contracts having been only for bookkeeping reasons (R. 612-613). His aggregate monthly salary of 2,500 marks a month (about $750 a month (R. 792)) made him the highest paid commentator on the German short wave network (R. 1175).[1]

From February 1, 1942, when these contracts went into effect, until July 1942, when petitioner's first wife died (R. 882, 1018, 1094), petitioner made two or three broadcasts a week (R. 613, 615, 821, 1175). He resumed his broadcasting activities in October 1942 (R. 615, 722-723). From December 1942 to May 1943, petitioner and his friend Wagner, the news editor of the U. S. A. Zone of the German Short Wave radio (R. 1082), worked on a program for German propaganda broadcasts beamed to the American troops in North Africa (R. 1097-1099, 1118-1128, 1132). This program (Ex. 35, R. 1099, 1100-1104) was designed to arouse doubt, homesickness, worry, and fear of the future in the American troops, and to "gradually arouse the belief that the U. S. again, as in 1917-18, is fighting on the wrong side" (R. 1101). Petitioner wanted to participate in the program (R. 1104), and suggested that he be selected to read poetry to raise "the cultural

[1] Schotte, who was chief of the entire U. S. A. Zone, and who gave petitioner instructions as to what to say (R. 1173-1175, 1087-1088, 1226-1227), received only 900 marks a month (R. 1175).

level and * * * gain listener interest" (R. 1104, 1121, 1128-1129, 1140). Petitioner personally selected the poetry to be read (R. 1129). In May 1943, however, petitioner was suspended from his post by Cleinow, the Superintendent of the Short Wave Agency, for denouncing Wagner to the Gestapo for pro-Semitism, and this suspension continued until some time in September 1943 (R. 617, 843-845, 1042, 1050-1051).

During this period of suspension, petitioner retained a lawyer to help him get restored to duty (R. 620, 844-845). In September 1943, in response to a letter from Cleinow, petitioner went to Berlin, and agreed to resume broadcasting on condition that he could make his recordings elsewhere, since he was no longer willing to work side by side with Wagner (R. 617-618, 845-846, 1042-1043). This was agreed to (R. 1043-1044), and petitioner thereafter made his recordings in Vienna until October 1944 (R. 618-619, 845-846, 981, 1071). The German short-wave transmitter had in the meantime been moved from Berlin to Koenigswusterhausen, 25 miles distant (R. 822, 936, 980), and petitioner's recordings were brought by courier from Vienna to Koenigswusterhausen (R. 846, 1053), where they were re-recorded on magnetic tape for broadcasting (R. 934-935, 936, 1051-1052).

In the spring of 1944, petitioner stopped broadcasting for about two months because of ill health and then resumed (R. 618, 723, 922). Beginning

in October 1944, he made his recordings in Munich (R. 619, 833-834, 981). His last broadcasts were in January or February 1945 (R. 492, 618, 961), and when, in late February or early March 1945, Cleinow wished him to return to Koenigswusterhausen for additional broadcasting, petitioner declined to expose himself to the dangers of that place and suggested making his recordings at Landshut (R. 873-875, 957-960, 999-1000, 1595-1597).

Throughout his activities as a broadcaster, petitioner was alert to protest whenever there was any interruption in his pay (R. 823, 830-831, 1072), and on one occasion he insisted that his daughters, who had appeared on a musical program with him (R. 890), be paid also (R. 822-823, 1038). When petitioner was asked by Cleinow to resume his broadcasting activities in September 1943, one of the conditions he insisted on was that his salary be paid more regularly (R. 1042); and as late as March 1945, when petitioner was discussing with his friends, the Sittlers, the demand by Cleinow that he return to Koenigswusterhausen to resume broadcasting, he complained that his salary payments were in arrears (R. 877).

*The substance of petitioner's broadcasts and his intent to betray the United States.*—Nazi Germany used foreign radio broadcasts as a means of psychological warfare against its enemies. The broadcasts were designed "to support the German war effort by creating disunity in other peoples by

undermining [their] morale" (R. 789), "to create disunity among the Allies, * * * to build up racial controversies [in the United States], to create unrest regarding the economic inequalities in the country, to work on minority problems and similar ideas, with the purpose of ultimately driving a wedge between the people and the Roosevelt Administration * * *" (R. 1088). The five principal themes of German radio propaganda implemented these aims. They were (1) Bolshevism, the No. 1 Enemy, (2) Anti-Semitism, (3) German Social Progress, (4) German Military and Moral Might, and (5) England's Economic and Political Decline (R. 790-793, 1089-1092, 1174). Moreover, "The commentators were told to use the threat of inflation * * * as a means of propaganda, all to create unrest along that line. * * * Commentators were told to stress themes along the lines that America would never be able to win the war, that it would be much too costly, that the establishment of a Second Front would fail * * *, that actually America had nothing to do in this European war, that America had no war aims, that the GI did not know what he was fighting for; * * * to create homesickness among the American troops and defeatism in general * * *" (R. 1091-1092).

The German propaganda machinery was carefully devised so that these themes, originated by the very head of the Nazi state (R. 789-790), would filter down through the commentators to the listen-

ers. The Propaganda Ministry, under Dr. Goebbels, was directly responsible to Hitler (R. 781-782). Goebbels received his directives from Hitler (R. 785-786), and transmitted these to his subordinates at conferences held daily (R. 785-786, 793, 802-803). Goebbels discussed the military and political situations, and told his staff what to play up and what to play down (R. 802, 804). This ministerial conference was followed by a smaller one, presided over by Fritsche, head of the Radio Division of the Propaganda Ministry, at which directions were given as to how to handle the news "and what line of the daily propaganda was being observed" (R. 786-787). Winkelnkemper, head of the Reich Radio Corporation, which was wholly owned by the German Reich (R. 783, 795) and under the jurisdiction of the Propaganda Ministry (R. 782-783), attended both of these daily conferences (R. 786, 787). Thereafter he held a conference of his own, at which his subordinates, including the Zone heads of the overseas broadcasting service, were present (R. 787-788, 1172; Ex. 34, R. 789). Following Winkelnkemper's conference, the head of the U. S. A. Zone—Schotte, later Koischitz, and finally Houben (R. 784-785, 830, 1172)—held a Zone commentators' conference, at which the directives of that day were passed on to the commentators (R. 1087-1092, 1173, 1227-1228). Petitioner regularly attended the daily conference of commentators for the U. S. A. Zone (R. 671, 821-822, 1173), and met

from time to time with other English-speaking broadcasters (R. 1092, 1094), including the notorious Lord Haw-Haw[2] (R. 1092).

Deviations from the party line were summarily dealt with; Schotte, for example, the head of the U. S. A. Zone, spent four months in a concentration camp for not properly censoring remarks at variance with a Propaganda Ministry directive (R. 1172, 1194-1196). Petitioner's manuscripts were, prior to recording, subject to political (R. 821, 1072, 1086-1087) and military censorship (R. 821, 826). The German broadcasts were carefully beamed to the United States (R. 648-650, 687-688), and consisted of a German portion lasting one hour and an English portion lasting six hours, the latter made up, in equal parts, of news and commentary, and music and entertainment (R. 1069-1070).

Twelve recordings (Exs. 21-32) made by petitioner, fully identified as such (R. 637, 641-648, 768, 769-776, 823-824), were offered in evidence, not to prove any overt act, but to show petitioner's treasonable activities and his intent to betray (R. 653, 655, 656, 767, 1821). All twelve recordings were played back to the jury, and the close concordance between petitioner's broadcasts and the official propaganda themes of his Nazi employers are indicated by the record references set out in the mar-

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[2] As to whom, see *Joyce* v. *Director of Public Prosecutions*, [1946] A. C. 347.

gin.[3] The recordings clearly establish, also, petitioner's desire that the country of his allegiance lose the war (Ex. 23, R. 1211, 1214; Ex. 24, R. 1146-1147, 1147-1148; Ex. 25, R. 1216-1217; Ex. 26, R. 812, 813, 815; Ex. 27, R. 974-975; Ex. 31, R. 1067-1068; Ex. 32, R. 835-836), and were, of course, consistent with his wish, frequently expressed in conversation, that Germany win the war (R. 752-753, 917, 920, 1086, 1204, 1206), and his hope that the United States would drop out by way of a negotiated peace (R. 753, 1204-1205, 1207). "He thought it his mission to drift the United States out of the war" (R. 1205). Many of these broadcasts of petitioner's were heard by monitoring stations in the United States (R. 491, 494, 695-696, 705).

Prior to the indictment on which he was tried,

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[3] *Bolshevism as Enemy No. 1:* Ex. 21 at R. 713; Ex. 22 at R. 1056, 1058; Ex. 27 at R. 974; Ex. 29 at R. 806; Ex. 31 at R. 1064.

*Anti-Semitism:* Ex. 21 at R. 710, 714; Ex. 22 at R. 1061; Ex. 24 at R. 1145, 1147; Ex. 25 at R. 1216, 1218-1219, 1221; Ex. 26 at R. 811, 812, 813, 815; Ex. 27 at R. 972-973, 978; Ex. 28 at R. 760-765; Ex. 29 at R. 806-807, 809-810; Ex. 30 at R. 754, 755, 759; Ex. 31 at R. 1063, 1064; Ex. 32 at R. 836-840.

*Social Progress in Germany:* Ex. 21 at R. 712-713; Ex. 22 at R. 1055-1061; Ex. 24 at R. 1149; Ex. 25 at R. 1217-1221; Ex. 27 at R. 975-976.

*Germany's Military Might:* Ex. 23 at R. 1212-1214; Ex. 24 at R. 1148-1149; Ex. 25 at R. 1218; Ex. 27 at R. 974-978; Ex. 31 at R. 1068; Ex. 32 at R. 835-836.

*England's Decline:* Ex. 24 at R. 1148; Ex. 31 at R. 1062-1067; Ex. 32 at R. 835.

*America Can't Win:* Ex. 23 at R. 1210-1215; Ex. 24 at R. 1147-1148; Ex. 25 at R. 1216-1217, 1220; Ex. 26 at R. 811-815; Ex. 27 at R. 974; Ex. 32 at R. 835.

*America's Post-War Financial Collapse:* Ex. 24 at R. 1143-1147.

petitioner had on July 26, 1943, been indicted for treason in the District of Columbia (R. 553), and he learned of this earlier indictment while still in Germany (R. 751, 1084). He was not surprised by this news, however, "because he considered this a natural consequence of the ideological war that he was fighting * * *" (R. 740). And upon first being interviewed by an American Army officer in May 1945, he said that his plans were to return to the United States and to be tried for treason (R. 492, 499, 503). Petitioner never considered giving up his American citizenship, and could not understand his friend Sittler's having done so (R. 899-900, 923-925, 1019-1020). "He [petitioner] felt he was a better patriot than many Americans who were over here" (R. 1019); yet he wore the Nazi swastika on his clothing (R. 635, 663-664, 681-682, 683-684).

*The overt acts submitted to the jury.*—Ten overt acts were submitted to the jury, who, in special findings, found that each of them was "a treasonable act committed by the defendant Chandler with an intent to betray the United States" (R. 32-33). Generally stated, three of the overt acts (Nos. 9, 17, and 18; R. 5, 7) charged that petitioner arranged for or made actual recordings; three (Nos. 2, 4, and 5; R. 4), that he participated in conferences looking to the improvement or formulation of broadcasts; and four (Nos. 1, 6, 22, and 23; R. 3-4, 4-5, 8), that he participated in conferences relative to the resumption or continuation of his broadcast-

ing activities. Each and every one of these ten overt acts was established by the requisite two-witness proof, but, in the interest of brevity, the evidence in respect of only overt acts Nos. 17 and 18 is here summarized.[4]

Overt act No. 17 charged that between July 5 and July 25, 1944, at Koenigswusterhausen, petitioner spoke into a microphone in a recording studio of the German Short Wave Radio Station to record a talk for subsequent broadcast by the Station. Edward and Lily Sittler both testified that during the month of July 1944 petitioner stated that he wanted to make a recording of mixed poetry and music (R. 869, 964-965, 997). Both testified that they went with him to the radio house at Koenigswusterhausen, and were with him while he made the recording (R. 869-871, 998, 1595). Both testified that Mrs. Sittler performed the duties of an absent technician (R. 870-871, 896, 998), both saw petitioner speaking into the microphone (R. 870, 999), and both testified that he announced himself at that time as Paul Revere (R. 870, 998). Both likewise testified that making the recording in question was petitioner's idea (R. 869, 997, 1033), that he selected

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[4] Since a treason conviction may be had on any single overt act established by the testimony of two witnesses, and since the jury in this case made special findings in respect of each and every one of the ten overt acts submitted to them, it is not, of course, necessary for the Government to demonstrate the constitutional sufficiency of each one of the ten overt acts. Compare *Haupt* v. *United States*, 330 U. S. 631, 641, note 1, with *Cramer* v. *United States*, 325 U. S. 1, 36, note 45.

American poetry (R. 938, 997, 1034) and Grieg's Peer Gynt Suite (R. 938, 1034), and that the program was designed to commemorate Americans killed in the war (R. 869, 937-938, 966-967, 1034).

Overt act No. 18 charged that between June 1 and October 31, 1944, at some time other than that alleged in overt act No. 17, petitioner at Koenigswusterhausen, spoke into a microphone in a recording studio of the German Short Wave Radio Station for the purpose of making a dialogue recording with Edward Sittler for use by the station. Edward Sittler and Von Richter both testified that, in the summer of 1944, Sittler and petitioner, after returning from a reception for broadcasters given by the Propaganda Ministry, came to Von Richter at Koenigswusterhausen and suggested making a dialogue recording (R. 871-872, 1074). Both testified that a recording was made, that Von Richter considered it too long and not sufficiently interesting, and that thereupon a second and satisfactory recording was made (R. 872-873, 1074, 1142-1143). Both saw petitioner speaking into the microphone (R. 872, 1074). Sittler testified that Von Richter stated that he intended to broadcast the recording that same night (R. 873), and Von Richter testified that the recording was in fact so broadcast (R. 1075). According to Sittler, the subject-matter of the recording concerned the relative armament-producing capacity of the United States and Germany (R. 873, 897-898).

ARGUMENT

1. Petitioner contends that an American citizen residing in the territory of the enemies of the United States does not, by adhering to such enemies, giving them aid and comfort, commit treason against the United States (Pet. 6, 12-14). The contention is without merit. The constitutional definition of treason was specifically shaped to include treason committed abroad; Congress clearly intended to provide for the punishment of such foreign treasons; and nothing in the incidents of the enemy status which attaches to an American resident in enemy country permits such an individual voluntarily to betray his native land.

(a) That the draftsmen of the constitutional definition of treason (*supra*, p. 3) intended that there should be no territorial limitation in respect of the place where the crime might be committed, is perfectly clear from the history of the constitutional provision, as summarized by the Court of Appeals (R. 1917-1918). That history demonstrates that the limiting language, "within their territories [i.e., of the United States]," which was contained in a proposed definition of the crime, was voted down, and that the definition finally adopted was without any limiting territorial language. Congress, therefore, was clearly given the power to denounce the crime regardless of where it might be committed.

(b) Congress promptly exercised that power by providing in the Act of April 30, 1790, c. 9, §1, 1

Stat. 112, that "if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort *within the United States or elsewhere,* * * * such person or persons shall be adjudged guilty of treason against the United States * * *" [italics added]. This language was carried forward, without pertinent change, into R.S., §5331, and into §1 of the Criminal Code of 1909, 18 U.S.C., 1946 ed., 1, and is now found in 18 U.S.C., 1948 Revision, 2381 *(supra,* p. 4). As the court below observed, "In view of the striking similarity between the constitutional definition of treason, and the almost contemporaneously enacted statutory definition, the same reasons which lead to the conclusion that the constitutional provision encompasses foreign treasons also indicate that the statutory language is to be read in similar comprehensive fashion" (R. 1919). Indeed, in view of the specific language of the statute, "within the United States or elsewhere," there is no room for inference or speculation on the matter. Congress has *expressly* provided for the punishment of "foreign" treason. That treason need not be committed in the United States to be punishable is thus more easily demonstrated than that conspiracy to defraud the United States need not be committed in the United States to be punishable, a proposition which is now well settled. *United States* v. *Bowman,* 260 U.S. 94. Cf. *Skiriotes* v. *Florida,* 313 U.S. 69, 73-74. It is in-

teresting to note that petitioner's argument was unsuccessfully made by Roger Casement in *Rex* v. *Casement*, [1917] 1 K. B. 98.

(c) But petitioner suggests that it "has always been recognized that, by reason of the obligation of local allegiance to the country of residence, there might be in such a case some adherence which was not criminal" (Pet. 13). Of course, it is clear that in respect of his property an American resident in enemy territory during wartime is deemed to be an enemy, and this follows regardless of his nationality, personal sentiments, or loyalty.[5] But, manifestly, residence in enemy territory does not qualify or cancel the permanent allegiance owed to one's own country. The circumstance that while petitioner was in Germany he could not plot against Germany did not authorize him to engage in activities there which would be treason against the United States. An American citizen living in enemy country is not, therefore, by that fact rendered incapable of committing treason against the United States. He must obey the enemy's laws while living in the enemy's territory. But he cannot actively support the enemy's effort to crush the country of his permanent allegiance. For to do so

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[5] *The Venus*, 8 Cranch 253; *The Frances*, 8 Cranch 335; *The Mary and Susan*, 1 Wheat. 46; *Mrs. Alexander's Cotton*, 2 Wall. 404; *Miller* v. *United States*, 11 Wall. 268; *Ford* v. *Surget*, 97 U. S. 594; *Juragua Iron Co.* v. *United States*, 212 U. S. 297.

is to betray the country of his permanent allegiance, and is clearly treason. As the Court of Appeals observed, "the present case [does not] necessitate any detailed examination as to how far an American citizen, caught in an enemy country at the outbreak of war, may, in order to earn a living and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree. It is enough to say that in our opinion the present case falls clearly on the treasonable side of the line" (R. 1945).

2. Petitioner contends that "mere words" cannot constitute treason, that all he did was utter "mere words," and that his conviction was, consequently, erroneously sustained (Pet. 6, 14-17). We submit that the contention is preposterous.

The heart of the present case is whether an American citizen is guilty of treason when, in time of war, he broadcasts propaganda for the enemy, from the enemy country, for pay, for the purpose of weakening his own country and insuring the enemy's success. We submit there can be only one answer to this inquiry. Of course such a person commits treason. He adheres to the enemy, he gives the enemy aid and comfort, he intends to betray his own country. He makes himself a part of the enemy's propaganda organization, which

the enemy recognizes to be part of its war machine. He does so for hire (although the consequences would not be different if he were a volunteer). He desires the enemy and not his own country to win the war in which they are engaged, and actively works to that end. This, we submit, is treason by any definition.

It is true, as remarked by the court below, that "There are occasional statements to be found in the books to the effect that mere words cannot amount to an overt act of treason" (R. 1932). Thus, it was said in *Wimmer* v. *United States,* 264 Fed. 11, 12-13 (C.A. 6), certiorari denied, 253 U.S. 494, that " * * * one cannot, by mere words, be guilty of treason." And again, "Words oral, written, or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime." *Charge to Grand Jury,* Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (C.C., S.D.N.Y.). Isolated statements of this nature no doubt lend a degree of plausibility to petitioner's present contention, but only when read *in vacuo,* apart from the context in which they were written. Manifestly, the writers of such statements as those quoted did not have in mind any such potent weapon as radio propaganda in total war. Petitioner's argument, moreover, proves too much. For, obviously, "One may commit treason by conveying military intelligence to the enemy, though the only overt act is the

speaking of words," and "Other cases may readily be imagined where the speaking of words might constitute treason" (opinion below, R. 1933).

In *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347, the essence of the charge was identical with the one here under consideration. The contested issue was whether Joyce, admittedly not a British subject, was by reason of his possession of a British passport sufficiently under the King's protection to be guilty of treason. But counsel for Joyce did not even venture to argue, either at the trial, or in the Court of Criminal Appeal (*Rex* v. *Joyce*, 173 L.T.R. 377), or in the House of Lords, that broadcasting for the enemy did not amount to treason. And the minority in *Cramer* v. *United States*, 325 U.S. 1, discussing the question of intent, on which there was no division of opinion in this Court, said (325 U.S., at 57): "Propaganda designed to cause disunity among adversaries is one of the older weapons known to warfare, and upon occasion one of the most effective. * * * When [Cramer] was shown consciously and voluntarily to have assisted this enemy program [of propaganda] his traitorous intent was then and there sufficiently proved."

This case presents no question as to how far a citizen residing in this country may go, in wartime, in exercising his right of free speech in domestic political activity. We submit that the court below was clearly correct when it said, "It

is preposterous to talk about freedom of speech in this connection; the case cannot be blown up into a great issue of civil liberties" (R. 1935). For "it cannot be said that what Chandler did was merely exercising his right of free speech in the normal processes of domestic political opposition. He trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully. * * * Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment" (*ibid.*). Petitioner adhered to the enemy; he gave the enemy aid and comfort. This was treason, and the fact that his adherence and aid consisted of uttering words of propaganda over the radio waves rather than shooting bullets—participating in psychological warfare designed to undermine American fighting morale rather than dropping bombs or betraying military secrets—is of no moment.

3. Next petitioner contends, "If treason may be committed by 'mere words,' it is not enough to allege and prove by the direct testimony of two witnesses that the defendant spoke or prepared to speak" (Pet. 17); the Government is required to allege as an overt act, and establish by two-witness proof, exactly what he said (Pet. 7, 17-19).

Of course, the Government did establish exactly what petitioner said on twelve specific occasions by

introducing in evidence and playing for the jury twelve different recordings of petitioner's voice (*supra*, pp. 16-17). Such convincing proof of the intent to betray and the commission of overt acts in furtherance of that intent is rarely available in a court of law, and petitioner, indeed, does not deny the making of the recordings. But those recordings were received in evidence solely on the issue of petitioner's intent to betray, not as overt acts which the Constitution and the statute require to be proved by the testimony of two witnesses. The overt acts relied upon by the Government as having been established by the requisite two-witness proof were the ten acts to which we have referred in the Statement, *supra*, pp. 18-20. Two of those overt acts (Nos. 17 and 18) consisted of making recordings for subsequent broadcast. The Government established each of these acts by two-witness proof, but because it did not show precisely what petitioner said on either of those occasions, or that what he then said was *per se* treasonable, petitioner urges that the constitutional requirement was not met. We submit that the contention is clearly without merit.

Petitioner's contention is completely refuted by the *Haupt* case, 330 U. S. 631. For in that case, as the court below pointed out (R. 1940, n. 5), "the two witnesses testified to an overt act which to them was entirely innocent, namely, that the defendant accompanied his son to the house of a prospective

employer to further the son's application for employment. This act was shown to be a treasonable one by the other evidence in the case, indicating that the son, to the knowledge of the father, was an enemy agent bent on a mission of sabotage."

4. Petitioner further contends that "If treason may be committed by 'mere words,' it should be made to appear that the words actually gave aid and comfort to the enemy" (Pet. 19). It is clear that by this petitioner means that participating in the enemy's program of psychological warfare by broadcasting propaganda designed to undermine American morale and weaken the American will to carry on the war is not treason unless there is proof that the "propaganda was effective" (Pet. 19).

If this contention is sound, then Benedict Arnold was no traitor, since he failed in his effort to deliver West Point to the British. If sound, petitioner might have joined and served in the German Army, yet could escape conviction for treason in the absence of proof that the operations in which he participated won ground for the Nazis, or that the bullets which he fired found their mark. If sound, it would not be treason to deliver to the enemy a paper containing military secrets, if the enemy agent lost the paper before delivering it to his superiors to be put to use. As Treby, L.C.J., said in *Trial of Captain Vaughan,* 13 How. St. Tr. 485, 533, "* * * And if this [cruising in a French warship in English waters, prepared to engage the

English in action] be not adhearing [to the enemy], &c. it may as well be said, that if the same persons had made an attack upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them."

Obviously, success in a treasonable enterprise is not required to sustain a conviction for treason. "[Haupt's] acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but defendant did his best to make it succeed." *Haupt* v. *United States,* 330 U. S. 631, 644.

5. It is difficult to understand petitioner's contention that "If the indictment * * * is to be construed as charging a single treasonable enterprise, direct proof by two witnesses of more than a few routine and insignificant overt acts was required" (Pet. 20, 7). He in effect concedes that "not all the details in that enterprise need have been proved by two witnesses" (Pet. 20), but suggests that "more than a few" overt acts were required to be established by the two-witness quantum of proof. If we correctly understand the contention, it is that while a single overt act, established by the testimony of two witnesses, will suffice to

sustain a treason conviction where the treasonable activity is of short duration and consists of but one or a few overt acts, the number of overt acts required to be established by two-witness proof increases in proportion to the duration and enormity of the treasonable enterprise. But to state the contention is to refute it. The Government established by overwhelming evidence petitioner's adherence to the enemy and his intent to betray, and proved by two witnesses each of ten overt acts of adherence and rendering aid and comfort. This, manifestly, was more than sufficient, since any one overt act, proved by two witnesses, would have sufficed under the constitutional and statutory requirement.

6. Petitioner contends he could not be guilty of treason because he "had the heart of a patriot," because he "acted from patriotic motives" (Pet. 22), because he acted on the "sincere conviction" that his broadcasting activities on behalf of the German Reich were done in "the best interests of the United States" (Pet. 7). We shall assume, for argument, that his motives were pure, as he claims, but submit that that fact is utterly irrelevant, and obviously so.

Purity of motive, as the court below tersely observed, "is a matter that may be sifted out at the last Great Judgment Seat; but the law of treason is concerned with matters more immediate" (R. 1943). Adhering to the enemy, rendering him aid

and comfort, with the intent to betray, is what the court in a treason prosecution is concerned with; what motivates the adherence, the aid, and the betrayal is a matter quite beside the point. *Cramer* v. *United States,* 325 U. S. 1, 29; see also *Haupt* v. *United States,* 330 U. S. 631, 641-642. Purity of motive has never been deemed to save an intentional act, otherwise criminal, from the consequences of criminal conduct. The existence or non-existence of a motive to commit a crime is, to be sure, evidential on the issue whether the defendant at the bar was the culprit; but where that fact is established by the evidence, the purity or the vileness of the defendant's reasons for committing the crime is of no moment. Petitioner may have believed that his country was on the wrong side of the late war and deserved to lose it. But that fact, if it was a fact, has no greater relevance in this case than a murderer's belief that his victim deserved to die.

7. Petitioner's contention that "Congress has not by law directed the place of trial of treason committed within the territorial jurisdiction of a foreign government" (Pet. 8, 25-27) is also without merit. To the contrary, Congress has specifically provided that "The trial of all offenses committed upon the high seas, *or elsewhere out of the jurisdiction of any particular State or district,* shall be in the district where the offender is found, or into which he is first brought" [italics added]. 18

U. S. C., 1948 Revision, 3238.[6] *Ex parte Bollman,* 4 Cranch 75, relied on by petitioner as authority for his contention that this statute has no application in this case (Pet. 26), is not such an authority; as the court below pointed out, that case holds that the "first brought" provision has no application to a crime committed within the territorial jurisdiction of a district court. It would be a strange result if, after Congress had defined treason to include treasons committed abroad, the literal language of the above-quoted venue provision were held not to define the venue for the trial of such treasons. *United States* v. *Bowman,* 260 U. S. 94, 102, rejects petitioner's argument that the phrase "or elsewhere" in the venue statute refers only to the high seas.

8. Petitioner was brought from Germany to the United States by a plane destined for the District of Columbia. After passing over the state of Maine, the plane made a forced landing in Massachusetts and later proceeded to the District of Columbia. The Government believed that the "first brought" clause required petitioner to be brought to trial in Massachusetts and, accordingly, petitioner was reindicted and tried in that district. Petitioner contends, on alternative theories, that he was "first brought" either into Maine or the District of

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[6] Enacted pursuant to the constitutional provision that "The Trial of all Crimes * * * shall be held in the State where * * * committed; but when not committed within any State, * * * at such Place or Places as the Congress may by Law have directed" (Art. III, Sec. 2, last clause, *supra,* p. 4).

Columbia. The Court of Appeals held that "the district into which the accused is first taken under custody and landed is the district into which the accused is 'first brought' * * * and this was the district of Massachusetts in the case at bar." The court stated:

> * * * Such an interpretation is consistent with all the decided cases to which our attention has been directed. It is an interpretation which furnishes a rule of convenient application, turning on easily provable objective facts and not depending upon an inquiry into the intent of the persons who had the accused in custody. [R. 1924-1925].

9. Finally, petitioner contends that the "District Court ought not to have exercised jurisdiction" over his person since his removal "from Germany by the United States Army was in violation of the laws of the United States." Specifically, it is asserted (a) that under international law and by a treaty with Germany petitioner had a right of asylum in Germany which was violated by his removal to the United States, and (b) that the use of the Army to effect his removal was in violation of 10 U. S. C. 15 (Pet. 23-24). These contentions are thoroughly refuted by the opinion of the Court of Appeals (R. 1925-1930), to which, in the interests of brevity, reference is made. In brief, the court below held (a) that the extradition treaty between the United States and Germany (47 Stat. 1862) did

not obligate the United States, where it and its military allies have assumed the powers of sovereignty in Germany, to refrain from bringing an American citizen to trial for treason; (b) that while under international law a State may grant asylum to a fugitive offender against the laws of another State, it is not obliged to do so but may surrender the fugitive; and (c) that the Act of June 18, 1878, 20 Stat. 152, 10 U. S. C. 15, prohibiting the use of the Army as a *posse comitatus,* has no application "to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime."

**CONCLUSION**

The judgment below is clearly correct, there is no conflict of decisions, and no question is presented which requires further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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